

I-2-1-80. The Right to Representation

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(Transmittal I-2-221)

The Social Security Administration (SSA) neither encourages nor discourages representation. A claimant receives notice of the right to representation several times prior to his or her scheduled hearing before an administrative law judge (ALJ).

The claimant receives the following written notices advising him or her of the right to representation:

- forms SSA-L443 or SSA-L444 "Notice of Disapproved Claim";
- form SSA-HA-501 "Request for Hearing by Administrative Law Judge";
- form SSA-HA-L2 "Request for Hearing Acknowledgment Letter" (including the "Right to Representation" pamphlet, SSA Publication No. 05-10075); and
- form SSA-HA-83 "Notice of Hearing" (including the "Right to Representation" pamphlet, SSA Publication No. 05-10075).

Additionally, the claimant receives oral notification of the right to representation during any prehearing conference (PHC) or prehearing development contact(s).

A. Prior to Hearing

1. Prehearing Conference

If a PHC is conducted pursuant to Hearings, Appeals and Litigation Law (HALLEX) manual I-2-1-75, an ALJ or authorized designee must advise the claimant of the right to representation during that PHC.

An ALJ or authorized designee is not required to recite specific questions regarding the right to representation or the claimant's capacity to make an informed choice about representation. However, below are examples of questions the ALJ or authorized designee could ask an unrepresented claimant on the record:

- Did you receive the hearing acknowledgement letter and its enclosure(s)?
- Do you understand the information contained in that letter, specifically concerning representation?

2. Prehearing Development Contacts

Hearing office (HO) staff may contact an unrepresented claimant prior to a hearing through a prehearing development contact (PHDC). During a PHDC, HO staff must verify that the claimant is unrepresented and inform him or her of the right to representation.

a. Confirming the Right to Representation

HO staff must communicate the following information during, or subsequent to the PHDC, in order for an ALJ to deny a

request to postpone a hearing for the claimant to obtain representation (see B.2. below):

- There is no requirement that the claimant obtain a representative.
- If the claimant does not appoint a representative, SSA will make every reasonable effort to obtain all relevant medical and non-medical records.
- The benefits of appointing a representative include having the representative obtain evidence, prepare for proceedings before SSA, develop the claimant's claim(s), and present the claim(s) in an administrative hearing. If the claimant is unrepresented, an ALJ will question the claimant at the hearing.
- If the claimant wishes to obtain a representative, he or she should begin the process of finding a representative as soon as possible.
- Some representatives may charge a fee, but there are also legal service organizations that may represent the claimant free of charge.
- If the claimant seeks to reschedule the hearing to obtain a representative, an ALJ may deny the claimant's request unless there is good cause.
- The claimant must affirm that he or she understands the information explained to him or her regarding the right to representation.

b. Documenting Advisement of the Right to Representation

HO staff will document on a form SSA-5002 "Report of Contact (ROC)" that the claimant was advised of the right to representation and that he or she affirmed understanding of this information, pursuant to a. above. The ROC will become part of the claim(s) file. HO staff will also enter a remark in the Case Processing and Management System noting the date that HO staff made contact with the claimant and that there is an associated ROC in the claim(s) file.

B. Administrative Law Judge Hearing

1. Advisement of the Right to Representation

If a claimant is unrepresented at a hearing, an ALJ will confirm during the opening statement (see HALLEX I-2-6-52) that the claimant was properly advised of the right to representation, pursuant to this section, and that the claimant is capable of making an informed choice about representation.

If the record shows that the claimant had a PHC, and the ALJ adjudicating the case at the hearing does not intend to grant the request for postponement to obtain representation, the ALJ must identify or state on the record where the claimant was advised of the right to representation.

If the record shows that the claimant had a PHDC, and the ALJ does not intend to grant the request for postponement to obtain representation, the ALJ must state on the record that the

claimant was advised of the right to representation during the PHDC. If the record does not show the claimant was previously advised of the right to representation, using the information in A above, the ALJ conducting the hearing must:

- inform the claimant of his or her right to obtain representation; and
- cannot deny a request for postponement to obtain a representative, if it is the claimant's first request (see B.2. below).

At a hearing, if the claimant did not have a PHC or PHDC, the ALJ is not required to ask the claimant any specific questions regarding the right to representation and may communicate to the claimant the information provided in A.2. above, or ask the claimant other questions.

Below are examples of other questions that an ALJ may ask the claimant:

- Did you receive the hearing acknowledgement letter and its enclosure(s)?
- Do you understand the information contained in that letter, specifically concerning representation?

An ALJ must ensure that the claimant is aware of his or her options for representation. Specifically, an ALJ will explain the availability of both free legal services and contingency representation, and discuss access to organizations that assist individuals in obtaining representation. An ALJ will answer any questions the claimant may have, including explaining the claimant's options regarding representation, as outlined in the acknowledgement letter. However, the ALJ will answer any questions in a manner that neither encourages nor discourages representation.

If the claimant decides to waive the right to representation, the ALJ must determine whether the claimant is capable of making an informed choice to waive the right to representation. If the ALJ is satisfied that the claimant can make an informed decision, the ALJ must secure from the claimant a verbal waiver on-the-record or a written waiver, which will be marked as an exhibit. If the claimant requests to postpone the hearing to obtain a representative, the ALJ must consider the totality of circumstances and decide on-the-record whether to grant the claimant's request for postponement.

2. Postponement of Hearing to Obtain Representation

If the record does not show that the claimant was previously informed of the right to representation at a PHC or PHDC, as described in A above, and the claimant requests postponement of the hearing to obtain a representative, and it is the first request, an ALJ will typically grant the requested postponement. If the record shows that the claimant, during either a PHC or PHDC, was previously informed of the right to representation, as described in A above, the ALJ may deny any request for postponement to obtain a representative.

However, the ALJ must consider the totality of the circumstances including any mental limitations that impair the claimant's

understanding regarding the right to representation or any other factors that may indicate good cause (see, e.g., Social Security Ruling 91-5p, Titles II and XVI: Mental Incapacity and Good Cause for Missing the Deadline to Request Review and HALLEX I-2-0-60 for factors to consider when determining if there is “good cause”). For example, an ALJ may be more likely to grant a postponement when a claimant has an intellectual disability that prevented him or her from understanding the right to representation. An ALJ may also consider that the claimant made a good faith effort to obtain a representative but was unable to find a representative willing to accept appointment. However, in all cases, the ALJ will consider the totality of the circumstances in deciding whether to grant a postponement. If the ALJ denies the request for a postponement, the ALJ will explain to the claimant on-the-record at the hearing the reasons for denying the request.

If an ALJ grants postponement to obtain a representative, the ALJ will:

- Confirm that the claimant has been advised of the right to representation (following the procedures in A.2.a or B.1. above);
- Give the claimant information about organizations that provide free legal services, unless the claimant has indicated he or she already has a representative in mind and the representative has agreed to take the case;
- Advise the claimant to notify the HO if representation is obtained;
- Advise the claimant that he or she will receive notification of the new hearing date and time;
- Advise the claimant that normally only one postponement is permitted to obtain representation, unless there is good cause;
- Advise the claimant that if he or she appears at the rescheduled hearing without a representative, the hearing will proceed without the representative, unless there is good cause; and
- Obtain from the claimant a signed “Acknowledgement of Postponement in Order to Obtain Representation” (HO staff will exhibit the acknowledgement letter and provide a copy to the claimant).